WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **5514/20**
Applicant: **BELINDA HELEN EVANS**
Respondents: **AUSTRALIAN UNITY HOME CARE SERVICES PTY LIMITED**
Date of Determination: **5 January 2021**
Citation No: **[2021] NSWWCC 2**

The findings of the Commission are as follows:

1. Award for the respondent.

A brief statement is attached setting out the Commission's reasons for the determination.

PHILIP YOUNG
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Belinda Helen Evans (the applicant) is a 47 year old lady who was employed by Australian Unity Home Care Services Pty Limited (the respondent) as a care worker. In an Application to Resolve a Dispute lodged 23 September 2020 (Application) the applicant alleged several episodes of injury, as follows:

    (a) injury to her left shoulder on 23 January 2017 and a consequential right shoulder condition;

    (b) May 2018: bilateral carpal tunnel syndrome, alternatively a consequential condition, and

    (c) employment between 2008 and 2017 (deemed date of injury 1 November 2017): bilateral carpal tunnel syndrome.

2. In terms of the frank injury on 23 January 2017, a section 66 claim in respect of both shoulders (upper limbs whole person impairment) was resolved. At the teleconference on 21 October 2020 the allegation of carpal tunnel syndrome in respect of this date of injury was abandoned. What was and is left is a claim for whole person impairment in respect of bilateral carpal tunnel syndrome resulting from the nature and conditions (for want of a better expression) of the applicant's work between 2008 and 2017. As I understand, that is the major remaining claim for compensation.

ISSUES FOR DETERMINATION

3. The remaining issues concern causation of the applicant's bilateral carpal tunnel syndrome, and if established, the quantum of whole person impairment. It is only the first issue which is within this Commission's jurisdiction.

PROCEDURE BEFORE THE COMMISSION

4. The matter came for conciliation and arbitration hearing via teleconference on 14 December 2020. Mr C Tanner of counsel, instructed by Ms A Gracie, appeared for and with the applicant. Ms L Goodman of counsel, instructed by Ms J Gair, appeared for the respondent. Mr K Maakasa attended for the insurer.

5. The respondent had qualified two orthopaedic surgeons, namely Dr R Breit and Dr J Bosanquet. In view of Regulation 44, the respondent sought to remove the reports of Dr Breit. That occurred.

6. At the outset of the teleconference attempts were made by way of conciliation to achieve resolution of the matter, however, this was not possible. I am satisfied that the parties to the dispute understand the nature of the issues. I am further satisfied that I have used my best endeavours to bring the parties to resolution. That being the case, the jurisdiction of the Commission to hear this matter by way of arbitration hearing was enlivened.

EVIDENCE

Documentary evidence

7. The following documentary evidence was before the Commission:

(a) Application to Resolve a Dispute filed on 23 September 2020 and attachments (Application);

(b) Reply filed on 14 October 2020 and attachments (Reply) (excluding Dr Breit's reports), and

(c) Application to Admit Late Documents dated 13 October 2020 and attachments (admitted without objection).

8. There was some initial discussion concerning two undated word documents which Ms Goodman initially sought to tender, however, that application to admit those documents into evidence did not proceed.

Oral evidence

9. No oral evidence was given.

SUBMISSIONS

10. It is unnecessary to summarise in detail the submissions provided in this matter as a sound recording of the submissions is available to the parties.

DISCUSSION AND REASONS

11. The applicant in her statement[1] details the heavy and repetitive nature of her work. This work involved domestic cleaning for patients, manual activities associated with personal care of patients, a lot of vacuuming, scrubbing, mopping and sweeping. The applicant describes these activities as being performed over 38 hours per week. She dealt with extremely disabled patients, performing extremely heavy work which required physical strength.

12. At paragraph 12 of her statement the applicant refers to one particular brain injured patient. She said that she was required to massage his legs for a period of one hour every shift, otherwise the client would become aggressive. She said that she did this for five years between four and seven days each week and this had a significant toll on her hands and wrists.

13. Ultimately the applicant put in a "hazard complaint". I took this to mean a complaint about a work activity (the massage requirement) lodged with the respondent in writing. The applicant says that the respondent then changed this massage service to a 15 minute leg rub and then finally the task of leg rubbing was removed, the applicant says after numerous "hazard complaints".

14. The applicant has submitted, and it would appear clear, that the respondent has not produced "hazard complaints" notwithstanding a Direction for Production issued by the Commission. The obvious inference is that the respondent has something to hide. Why would it be hesitant to produce those documents if they existed?

15. It is I think unsatisfactory that the absence of "hazard complaint" documents is an issue. But the fact remains that in the absence of further concrete evidence regarding their existence and content, I do not think that this Commission can draw any adverse inference regarding (at least) the content of those reports, if they do exist. The applicant's evidence can be accepted that they do so exist. But the precise content of them and whether or not they are in any material respect relevant to the applicant's carpal tunnel syndrome is, regrettably, unclear.

[1] Application page 1 [11] – [12]

16. The initial onset of the applicant's paraesthesia and numbness of both of her hands occurred in about November 2017. This appears to be undisputed.

Dr T Kwong

17. Dr T Kwong in his report of 10 February 2020 expresses the view that the nature and conditions of the applicant's employment caused her bilateral carpal tunnel syndrome. He had seen the applicant on 29 November 2018 and obtained a history of the onset of the applicant's symptoms just before her left shoulder surgery. Dr Kwong expressed the view that the applicant was not fit for duties involving repetitive use of her hands.

18. The reports of Dr Kwong do not extend to engaging with the view of Dr Bosanquet, no doubt because they predate Dr Bosanquet's opinion of 21 May 2020. His reports do not address the risk factors mention by Dr Bosanquet, namely the applicant's age, body mass index and gender. In summary, Dr Kwong does not address these potentially (possibly) causative factors, in the applicant's particular case.

Dr S Kwa

19. Dr S Kwa is the applicant's treating surgeon. On 7 May 2018 he noted the applicant's complaint of hand symptoms and referred her to nerve conduction studies. Dr Kwa thought that the symptoms probably result from her left shoulder condition and noted that carpal tunnel syndrome was more common with shoulder problems. On 2 August 2018 Dr Kwa noted ongoing symptoms and ultimately operated on the applicant's bilateral carpal tunnel syndrome on 28 August 2019.

20. Dr Kwa's report of 14 November 2017 confirms that the applicant then presented with normal sensation and strength but numbness and tingling into her little finger, thereby suggesting ulnar nerve compression. This report (in terms of the little finger complaints) records this numbness and tingling "on occasions".

21. It is unclear from the evidence whether Dr Kwa was aware on 14 November 2017 that the applicant had not (according to the respondent) worked for the respondent since October 2017.

Dr Y Kassian

22. This general practitioner saw the applicant on 1 December 2017 and noted neuropraxia of the left ulnar nerve. The applicant also complained to Dr Kassian of numbness and tingling in her little finger. The applicant was still off work on 1 December 2017 and then resigned on 8 December 2017.

Dr J Bosanquet

23. Dr J Bosanquet's report of 21 May 2020 makes reference to the "AMA Guides for the Evaluation of Disease and Injury Causation". Dr Bosanquet notes that these guides refer to certain types of employment as giving rise to bilateral carpal tunnel syndrome. He makes the point that the applicant does not fall into any such type/category of employment.

24. The AMA guide just referred to has no legal status in this Commission in that the Commission is not constrained to accept the opinions in the guide. Dr Bosanquet accepts that the applicant suffered bilateral carpal tunnel syndrome but does not accept that this was caused by her employment. His opinion I think is based on the occupation category of the applicant, rather than the applicant's specific exposure to repetitive (etc) work.

The medical evidence generally

25. It is my view that several of the doctors' opinions, probably all of them, proceed on an incorrect premise. Dr Kwong and Dr Kwa both received late complaints of "finger tingling". Whilst this might be, to some extent, excused by the applicant's concentration on her shoulder problems, it is nonetheless a significant issue. Drs Kwong and Kwa reports and the report of Dr Kassian are, I think, deficient because of the matters abovementioned. In other words, Dr Kwong and Dr Kwa to the extent that they accept the causal connection do not appear to be aware of the applicant's actual work hour exposure from January 2017 until her complaint in November 2017. They have not considered the fact that the applicant during that period worked only 12 hours on average each week. Whether that makes a difference, I do not know. But I would have expected some medical guidance on causation in terms of the amount of hours worked, if it were available. That appears, in the circumstances, to be the applicant's onus-namely to convince the Commission that on the balance of probabilities her injury results from her employment.

26. My reading of the opinions of Dr Kwong and Dr Kwa is that they accept causation, but there is very little evidence of their knowledge of the applicant's intensity or frequency of work during 2017. That is to say, they have not related the specific intensity or frequency of that, work to the applicant's particular carpal tunnel syndrome complaint. In many circumstances that sort of medical analysis/correlation is unnecessary. But for this pathology, the work connection must be I think intensive or frequent use of the hands/wrists arising from the work performed. Both Drs Kwong and Kwa do not record any reduction in this intensity or frequency from January 2017 until the onset of the applicant's symptoms in November 2017.

27. Additionally, to my mind it makes common sense that a worker who has suffered shoulder(s) injury in January 2017 would not be overly exercising their wrists and hands because his/her shoulder(s) was disabled. Such a worker would, I think, be protecting the use of (her) shoulders during this time, and hence minimising the use of (her) wrists. So much is evidenced in my view by the low average of hours worked by the applicant each week during this period. The applicant does not cavil with the evidence in this regard.

28. The report of Dr Bosanquet is unhelpful. The doctor's fixation on the categorisation of a person's occupation/employment may well be supported by the relevant AMA Guide, but cannot in my view automatically preclude other repetitive occupations as being potentially or in fact realistically at risk for this condition. The enquiry in this regard in this (WCC NSW) jurisdiction focusses on the particular applicant, not necessarily general statistics regarding epidemiological experiences in other occupations in the general population. Those general statistics are interesting but are, in my view, in no way decisive in particular circumstances such as the present. Dr Bosanquet's opinion is, in my view, similarly unhelpful.

29. In the result, I have on the medical evidence come to the view that none of the medical reports provide much assistance to this Commission. Some do not have complete and accurate histories of the applicant's actual work performed for 10 months prior to her onset of symptoms. Some rely on epidemiology and scientific standards of proof applied in other occupations.

The applicant's work

30. It is evident from the applicant's statement that she refers to her work as having been a 60 hour fortnight, namely 30 hours per week. The respondent urges the Commission to not accept this evidence because the fact is from evidence from the respondent's documents in the Reply that between the time of the applicant's shoulder injury on 23 January 2017 and her complaint of tingling in her little finger on 2 November 2017 and complaint to Dr Kwa on 14 November 2017 she had worked on average only 12 hours per week.

31. The respondent also submits that when the applicant did present with symptoms she was not working with the respondent and the symptoms that she did complain of were consistent with ulnar nerve issues, not the median nerve. This is of some relevance, because later nerve conduction studies indicated that the median nerve was affected, whereas the ulnar nerve results were within normal limits.

32. There is no medical evidence addressing what appears to be a switch in nerve complaint and diagnosis. That is to say, the initial symptoms suggested ulnar nerve compression which nerve conduction studies later ruled out whereas these later studies found evidence of medial nerve impact. Be that as it may, I do not think much turns upon the differential symptoms and diagnosis. This is a common experience in this Tribunal where medical investigation is not for scientists acceptable as providing accurate scientific conclusions.

33. There is no doubt that the applicant's work as a care worker involved heavy and difficult work. The applicant was engaged in quite hard work over a number of years. So much so is acknowledged by the respondent and its senior managers. But the aetiology or connection between those intensive episodes of work during the time up to the onset of symptoms is not explained. The symptoms seem to just appear, it seems to me, in November 2017, at a time when the applicant was not working at all.

34. The records of the respondent set out the applicant's time worked between 13 October 2017 and December 2017 and confirm that the applicant was not working. The respondent's assertion that from February 2017 until December 2017 the applicant worked on average 12 hours per week is not seriously contested. Details of each week and how many hours worked by the applicant each week through that period are not provided, although I did specifically during the hearing vocalise and encourage that analysis.

35. These low working hours for the period in question can be accepted because the applicant suffered a left shoulder injury on 23 January 2017. No doubt I can infer that because of the left shoulder injury the applicant was not working as much as she might if uninjured. It would make sense that if the applicant was making less vigorous use of her left shoulder because of her serious left shoulder injury, then she would not be vigorously exercising her left hand and wrist during this time. The applicant does not provide any evidence explaining any earlier onset of symptoms prior to 2 November 2017, this being a nine month period where she worked on average 12 hours per week. The doctors do not address this aspect of the matter and one would have expected that it be specifically considered by either Dr Kwa or Dr Kwong. The story between 23 January 2017 and the onset of symptoms (ulnar) in November 2017 and the later medial nerve finding is, I think, incomplete and unexplained.

36. The absence of medical explanation concerning how, given these background matters, the applicant's wrist and hand symptoms could be upset in the period during at least 9 months before her initial symptoms makes it very difficult for this Commission to accept factually any connection between the applicant's bilateral carpal tunnel pathology and the applicant's work. There is no explanation supported by actual facts nor opinion from the doctors nor from the applicant, detailing what actually occurred between 23 January 2017 and 2 November 2017 in relation to her employment that caused or materially contributed to her condition. Reliance by the applicant upon the other aspects of her employment (repetitive and heavy work etc) in her many years of work is not supported by medical evidence concerning the belated complaint of symptoms.

DETERMINATION

37. In the circumstances I am not satisfied on the balance of probabilities that the applicant's bilateral carpal tunnel syndrome results from her employment with the respondent. There will be an award for the respondent.